No. 08-1205

In The

Supreme Court of the United States

A. STEPHAN BOTES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

I. Whether the Eleventh Circuit Court of Appeals erred by accepting the government's position that appearance of impropriety is *not* the proper standard for recusal of trial court and judicial candidates.

II. Whether the Eleventh Circuit Court of Appeals appellate review for "unreasonableness" has preserved de facto mandatory Guidelines, contrary to this Court's ruling in *Booker*[1] and its progeny.

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[1] *Booker v. U.S.*, 125 S.Ct. 738, 543 U.S. 220 (2005).

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ARGUMENT AND CITATIONS OF AUTHORITY

I. APPEARANCE OF IMPROPRIETY IS THE PROPER STANDARD FOR RECUSAL OF A JUDGE, AS WELL AS THE RECUSAL OF A JUDICIAL CANDIDATE.

The government seeks to recast the issue presented in the case as being solely related to the recusal of the prosecution's attorney. Opposition Brief, 8. The reason the government seeks to recast the issue is to deflect attention from its failure to respond to Botes' argument.

1. The government complains that Botes has failed to uncover any decision on the standard for recusing an attorney who is selected to be magistrate judge, or for declaring a mistrial on that basis. Opposition Brief, 7. Pursuant to Sup. Ct. R. 10(c), this Court may exercise its discretionary power of review if a Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. By rejecting the appearance of impropriety standard regarding the recusal of the lead prosecutor who was also magistrate-elect, the district court committed reversible error. Thus, this Court should settle the question, because as counsel for the government pointed out, it is a common practice throughout the districts for magistrate judges to be selected from the ranks of Assistant

United States Attorneys.[2] As this situation appears to be widespread and reoccurring, this Court should exercise its discretion to resolve this important federal question.

The district court's rejection of the appearance of impropriety standard also contravenes this Court's recent pronouncement in *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009). Pursuant to Sup.Ct. R. 10(c) this Court may properly exercise its discretion when a Court of Appeals has decided an important federal question in a way which conflicts with this Court's relevant decisions.

2. In its brief in opposition the government unsuccessfully attempts to distinguish the holding in *Caperton*. Opposition Brief, 10. The import of *Caperton* to Botes' case is that the government argued, both in the district and circuit courts, that the "appearance of impropriety is simply too slender a reed on which to rest a disqualification order except

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[2] At the in-chambers conference between counsel, the government, and the district court, the U.S. Attorney argued that although "this situation arises with enormous regularity, that people in the U.S. Attorney's Offices apply for magistrate positions . . . " and "for every magistrate position, there are probably many Assistant U.S. Attorney who apply. There are many who get on the short list. There are many who get selected, including in this district former Assistant U.S. Attorneys King, Deane, and Brill who all served as magistrate judges. Never before to our knowledge has – have those applicants or selected people . . . been required to recuse themselves from the matters they supervise." Tr.189-90. See also, Tr.91.

in the rarest of cases," and that "appearance of impropriety standard was the standard under the old model code that was in effect until 2000." *Caperton* establishes unequivocally that the proper standard to evaluate recusal remains the appearance of impropriety.

The issue does not turn, as the government suggests, on whether the judge was elected by the voters of a particular state, or was selected after an election held by the district court judges, or even whether campaign finances are responsible for the appearance of impropriety. The majority opinion reaches its conclusion on the ultimate matter, which admittedly *did* concern an elected judge accepting an extraordinarily extensive contribution to his judicial campaign from a litigant, only after discussing a myriad of circumstances which would provoke recusal at common law. *Caperton*, 129 S.Ct. at 2250-60.

Caperton emphasized that a "basic requirement of due process" is a "fair trial in a fair tribunal." *Caperton*, 129 S.Ct. at 2259. Noting that "[e]very procedure which would offer a possible temptation to the average man as a judge . . . " "or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law," the Court analyzed the facts of the case. *Caperton*, 129 S.Ct. 2260. The Court explained:

> As new problems have emerged that were not discussed at common law, however, the

> Court has identified additional instances which, as an objective matter, require recusal. These are circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'

Id., citing, *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456 (1975).

Tellingly, the *Caperton* majority discussed the role the judge's prior relationships could play in requiring recusal under the Due Process Clause. 129 S.Ct. 2261-62. Here, it is an examination of the change in relationships between the individuals involved which compels the conclusion that an appearance of impropriety infected the trial of the case, and that the Due Process Clause required recusal of the prosecutor or the judge.

The *Caperton* Court concluded that the judges' subjective inquiry into whether or not he was actually biased was error. Instead, the proper inquiry is whether, "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.*, at 2263, citing *Withrow*, *supra*, 421 U.S. at 47, 95 S.Ct. 1456. Thus, *Caperton* concluded the proper standard was whether there was an appearance of impropriety, and not, as the government urged in the district and circuit courts, whether there was an actual conflict.

Caperton, 129 S.Ct. at 2265. Because the district and circuit courts erred by using an improper standard, Botes' trial was infected with the appearance of impropriety, and his conviction must be reversed.

3. From the first time Botes raised the issue to its present response, the government has sought to limit consideration to the question of whether the AUSA could fulfill his function as a prosecutor "with integrity, impartiality and competence." Opposition Brief, 9, citations omitted; Tr.191. This argument fails to respond to Botes' claim, which he urged in the district and circuit courts, that the AUSA's elevation to the position of magistrate-judge placed defense counsel in the untenable position of openly opposing an individual who would soon be ruling on matters presented by his defense counsel in other cases. Tr.169, 204; Circuit Brief, 14-15. Defense counsel specifically argued that Botes was concerned his defense counsel would not be as zealous against the prosecutor, who would soon be ruling on counsel's motions and making decisions affecting his future clients. Tr.169, 204. Moreover, defense counsel also made the court aware that Botes was concerned that the district court's impartiality could reasonably be questioned in light of the new relationship created by the AUSA accepting the position as the employee of the district court and, further, that the district court had affirmatively participated in the decision to select the AUSA as the magistrate judge. Tr.170, 196. Botes made it clear that his motion for mistrial was based on the twin propositions that his case should not be

prosecuted by an individual who had accepted a position as the employee of the judge in the case, and further, his defense counsel could not be expected to put aside his professional interest in not antagonizing a magistrate judge-elect, before whom he would shortly be appearing. Defense counsel specifically stated that Botes, "fear[ed] that this Honorable Court may favor [the AUSA]," and cited two cases wherein the issue concerned the appearance of impropriety of the judge, not the prosecutor. Tr.168-170, *United States v. Young*, 481 U.S. 787 (1987); *Scott v. United States*, 559 F.2d 745 (D.C.Cir. 1989). The government has simply ignored these portions of the proceedings in its attempt to refocus the argument due to its weak position on Botes' actual argument.

4. The government complains that the petitioner frames this as a matter of state ethics rules, "an issue on which this Court ordinarily would not opine." Opposition Brief, 9. Again, Botes frames the issue as whether the proper standard to evaluate the recusal of the district court or the magistrate judge-elect simultaneously acting as the lead prosecutor in the case, was the appearance of impropriety. The government disputed that was the proper standard. The fact that both the judge and the magistrate judge-elect were bound to avoid even the appearance of impropriety, is merely another circumstance which compels the conclusion that under an objective standard, either the magistrate judge-elect should have stepped down as the prosecutor, or the district court should have had a duty to recuse.

5. a. Defense counsel clearly explained to the district court that the problem attendant upon the continued participation by the AUSA, after accepting the appointment as magistrate judge, centered on his disquiet in challenging the AUSA, who would soon be the judge in various matters he would be litigating, and that the court would favor his employee.[3] The government and the district court ignored defense counsel's points, and in the Circuit, the government continued to ignore these citations to the record. Here, the government misstates defense counsel's point. Rather, defense counsel maintained that *if* the prosecution remained on the case, the court's rulings could be misconstrued – thus creating the appearance of impropriety. See, Tr.196. Clearly, defense counsel stated his preference that the matter be resolved in favor of keeping the district court, as opposed to keeping the present prosecutor. This is simply not the same as inviting error.

Regardless, 28 U.S.C. § 455(a) is an "affirmative, self-enforcing obligation to recuse *sua sponte* whenever proper grounds exist." *United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989), rendering the government's argument toothless.

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[3] The government has yet to articulate a reason Botes would be concerned with whether a prosecutor could ethically continue to prosecute his case because of a conflict of interest. More to the point, within minutes of determining the AUSA was going to be a magistrate judge, defense counsel apologized to the AUSA three times for causing inconvenience with the motion for mistrial. Tr.168 at lines 1, 10, and 12.

b. There is no question that at the outset, all of the parties, as well as the court, recognized the appearance of impropriety inherent in the situation. The court said so, and the government never disputed this, only pointing out that the appearance of impropriety was not the appropriate standard, and that Botes must establish an actual conflict of interest for the prosecutor. Tr.173, 177, 185. In the circuit court the government never addressed Botes' contention regarding the appearance of impropriety, again choosing to characterize the issue as being whether the recusal of prosecutor requires the defense to establish a prosecutor's actual conflict of interest. Gov. Circuit Brief, 36-38. The Government, as Botes argued in his circuit Reply Brief and reiterates now, failed to acknowledge his argument in the district court, in the circuit, or in this Court, that he included in his objection the problem with the judge remaining in the case, in the event that the prosecution, as magistrate judge-elect, remained. Pet. 8; Circuit Reply Brief, 10; Circuit Brief, 14-15. Indeed, it seems quite unremarkable that under an objective standard, a member of the public would reasonably question the fairness of a court hearing a case his employee was prosecuting, and in which defense counsel was placed in the position of attacking an individual, before whom he would be appearing in the future.

Although the district court in Botes' case conducted an analysis of whether he was actually biased, the district court, just as the judge in *Caperton*, failed to complete the process, as he was led by the

government to believe the proper standard was actual bias, instead of the appearance of impropriety.

6. The government also complained Botes had offered "no objectively reasonable basis for questioning the district judge's impartiality in handling his case." Opposition Brief, 10. To the contrary, Botes noted that his case was close and he won an acquittal on more than two-thirds of the government's allegations. At issue was a critical jury charge which Botes contended deprived the jury of the ability to fairly judge the evidence. In his Circuit brief, Botes noted an example of the district court disclosing defense strategy in aid of the prosecution, and an example of the district court supporting the prosecution's contention that an incriminating conversation which Botes denied having, had actually occurred. Tr.382, 383, 699. Thus, Botes established the reasonableness of a lay observer concluding that the district court favored the prosecution in the case, and, as a result, the conviction was tainted. Reversal is required under these circumstances.

II. THE DISTRICT COURT TREATED THE SENTENCING GUIDELINES AS *DE FACTO* MANDATORY IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

a. Botes argues that the explicit comments of the district court establishes that the court indulged in the unconstitutional presumption that the Guidelines applied. Pet. 13-14. He pointed out that the

judge stated, as the hearing was beginning, that it was going to sentence within the guideline range, reiterated this comment after making the Guidelines rulings, and, in the statement of reasons for the imposition of sentence, said that the Court had considered sentencing the defendant pursuant to 18 U.S.C. § 3553, but decided ***not*** to because the guidelines range was more appropriate, and he had applied the Guidelines in the co-defendants' cases. Sent. Tr.4, 20, 67. The district court did not say that it considered the factors, or that he felt the sentence met the goals of the sentencing. Sent. Tr.67. Despite this, the government contends a "fair" reading of the transcript does not suggest the court thought the Guidelines were binding or entitled to a presumption of reasonableness. Opposition Brief, 12, 14 fn. 4.

To the contrary, the district court demonstrated, by both words and action, that it presumed a Guidelines sentence should be imposed in the case. Further, the comments revealed a fundamental misunderstanding regarding the process. The court said it was to either consider the factors, or the Guidelines. The comment reveals that the court did not recognize that the Guidelines are but one of several factors.[4] The announcement that judge intended to impose a sentence within the Guidelines range was more than

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[4] The judge also characterized the defense request to impose a sentence below the guideline range as a "request that he be sentenced pursuant to 3553," providing further evidence of misunderstanding. Sent. Tr.67.

a suggestion that he presumed a Guidelines sentence would be reasonable, instead, it is compelling evidence that the judge ***actually*** applied a presumption regarding the Guidelines.

In any event, the government contends in this Court that Botes did not preserve the issue in the district court, and cannot establish plain error.[5] Opposition Brief, 15. The government is incorrect regarding the standard of review. In *Booker*, this Court excised the standard of review portion of the Sentencing Reform Act, 18 U.S.C. § 3742(e)(4). In *Booker v. United States*, 543 U.S. 220, 259, 125 S.Ct. 738. In *Gall v. United States*, this Court further explained:

> Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or

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[5] Interestingly, the Government did not raise plain error as a defense to this issue in the Circuit court, contending instead that the sentence was reasonable and characterizing the issue as whether the failure by the district court to mechanistically recite the § 3553(a) factors was error. Government Eleventh Circuit Brief, 63.

> failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.

Gall v. United States, 128 S.Ct. 586, 597 (2007). This passage clearly directs the appellate court to review all sentences, regardless of whether an objection was interposed after its imposition.

The government attempts to distinguish *Nelson v. United States*, 129 S.Ct. 890 (2009), on the grounds that the comments by the court in *Nelson* were plain, whereas the comments by the court in *Botes*, were ambiguous. Opposition Brief, 16. Here the court was clear – the court explicitly announced its intentions and then implemented a Guidelines sentence, as announced. Because the court implemented a presumption that the Guidelines should be imposed, *Nelson* clearly controls and this Court should reverse in light of the similarities in the cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: This 27th day of July, 2009.

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